

## Message Text

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TO USMISSION GENEVA

INFO ALL NATO CAPITALS

AMEMBASSY MOSCOW

C O N F I D E N T I A L STATE 013704

E.O. 11652: GDS

TAGS: PFOR CSCE

SUBJECT:CSCE: POTENTIAL LEGAL DIFFICULTIES

REFS: (A) GENEVA 7517; (B) GENEVA 7384

GENEVA FOR US CSCE DEL

1. FOLLOWING TELEGRAM RESPONDS TO CERTAIN LEGAL QUESTIONS  
RAISED REFTELS.

2. WE HAVE REVIEWED CURRENT REGISTERED TEXTS, ALMOST ALL  
OF WHICH ARE INCOMPLETE, AND FIND THAT IT IS DIFFICULT TO  
FORESEE FINAL FORM OR LEVEL OF COMMITMENT OF MANY OF THESE  
TEXTS. WE FEEL THAT, WHILE SOME TEXTS APPEAR TO BE  
EVOLVING TOWARD POLITICAL DECLARATIONS, THE TEXT PRODUCED  
BY SUBCOMMITTEE G ON COOPERATION IN THE ENVIRONMENT CON-  
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TAINS LANGUAGE WHICH COULD BE VIEWED AS CREATING LEGAL

AGREEMENTS. WE FIND, TOO, THAT THE LEVEL OF COMMITMENT CONTAINED IN THE FRENCH AND RUSSIAN LANGUAGE VERSIONS OF THE PREAMBLE TO THE HUMAN CONTACTS TEXT NOW UNDER NEGOTIATION AMBIGUOUS. REFERENCES TO THE INTENTION OF PARTICIPANTS TO PROCEED "WITH THE IMPLEMENTATION" OF THE PROVISIONS WHICH FOLLOW (RUSSIAN TEXT) OR "TO APPLY THE FOLLOWING TEXTS" (FRENCH TEXT) ALSO MIGHT BE CONSTRUED AS

LANGUAGE OF LEGAL COMMITMENT WHEN READ TOGETHER WITH THE TEXTS TO WHICH THE PREAMBLE APPLIES (INCLUDING THE FAMILY REUNIFICATION AND MARRIAGE TEXTS) WHICH ARE IN LARGE PART DETAILED PRACTICAL MEASURES TO BE TAKEN AND NOT GENERAL PRINCIPLES OF CONDUCT. ON THE OTHER HAND, THE REFERENCE TO MAKING HUMAN CONTACTS THE "AIM" OF PARTICIPANTS AND THE IDEA THAT PARTICIPANTS ARE EXPRESSING THEIR "INTENTION" TO APPLY OR IMPLEMENT THE TEXTS WHICH FOLLOW, SUPPORTS THE VIEW THAT THE LEVEL OF COMMITMENT IS POLITICAL AND NOT LEGAL.

3. REFTTEL A POINTS OUT THAT IF HUMAN CONTACTS TEXTS ARE TO BE CONSIDERED AGREEMENTS, FAMILY REUNIFICATION AND MARRIAGE TEXTS NOW PROVISIONALLY REGISTERED CAN BE READ TO CONFLICT IN CERTAIN RESPECTS WITH EXISTING U.S. LAW AND THE COMPETENCE OF THE FEDERAL GOVERNMENT.

4. THERE ARE BASICALLY TWO WAYS TO REMEDY THIS PROBLEM:

--I) WE CAN DECIDE THAT THESE TEXTS ARE TO BE CONSIDERED BY USG TO BE AGREEMENTS. IN THIS CASE WE WOULD EITHER HAVE TO AMEND THE FAMILY REUNIFICATION AND MARRIAGE TEXTS TO ELIMINATE THE PROBLEMS (AS SUGGESTED PARA 12 REFTTEL A) OR ENTER A RESERVATION AS TO APPLICATION OF THESE TEXTS (AS SUGGESTED PARA 15 REFTTEL A); OR

--II) WE CAN ELIMINATE ANY SUGGESTION THAT THESE TEXTS CONSTITUTE AGREEMENTS. THIS COULD BE ACCOMPLISHED BY WEAKENING THE LEVEL OF COMMITMENT (AS SUGGESTED PARA 9 REFTTEL A). ALL OF THE ABOVE SOLUTIONS COULD PRODUCE AN ACCEPTABLE LEGAL OUTCOME, BUT EACH WOULD POSE CERTAIN POLITICAL PROBLEMS.

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5. WE NOTE (PARA 20 REFTTEL A) THAT THE ALLIES DO NOT INTEND TO CREATE LEGAL OBLIGATIONS IN THE HUMAN CONTACTS AREA AND WOULD NOT CONSTRUCT THE LANGUAGE NOW UNDER DISCUSSION AS DOING SO. GIVEN THIS BACKGROUND TO THE PROBLEM, WE BELIEVE SOLUTION LIES IN EXPANDING FURTHER THE IDEA THAT THE CSCE WILL NOT ADOPT ANY LEGALLY BINDING TEXTS.

6. THEREFORE, BEFORE ATTEMPTING ANY OF THE SOLUTIONS SET FORTH REFTEL A, DELEGATION SHOULD SEEK AGREEMENT, FIRST OF ALLIES IN NATO CAUCUS AND THEREAFTER OF THE CONFERENCE, TO ISSUANCE OF A RESOLUTION OF THE CONFERENCE OR A STATEMENT BY THE CHAIRMAN OF THE COORDINATING COMMITTEE,

IN WHICH ALL DELEGATIONS WOULD CONCUR, ALONG THE FOLLOWING LINES:

"THE TEXTS TO BE ADOPTED BY CSCE REPRESENT MORAL UNDERTAKINGS ON THE PART OF THE PARTICIPATING STATES BUT DO NOT CONSTITUTE COMMITMENTS OF A LEGAL BINDING CHARACTER."

USDEL SHOULD MAKE THE ARGUMENT TO ALLIES AND OTHERS AS NECESSARY THAT IN U.S. VIEW, SOME OF TEXTS MIGHT BE CHARACTERIZED AS AGREEMENTS. IF THERE IS ANY AMBIGUITY IN THIS REGARD, USG WOULD HAVE CONSTITUTIONAL PROBLEMS WHICH WOULD REQUIRE USG TO EXAMINE CAREFULLY ALL TEXTS TO SEE THAT THERE ARE NO COMMITMENTS WHICH ARE BEYOND THE POWERS OF THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT UNDER OUR CONSTITUTIONAL SYSTEM. SOME TEXTS IN HUMAN CONTACTS AREA WOULD HAVE TO BE AMENDED TO MEET THIS STANDARD, OR USG WOULD HAVE TO ENTER A RESERVATION AS TO THE RESULTS OF THE CONFERENCE. SINCE USG IS VIRTUALLY ALONE IN CONCERN THAT SOME TEXTS WOULD BE CONSTRUED AS AGREEMENTS, WE WOULD SUGGEST THAT UNDERSTANDING OF ALL OTHER CONFERENCE PARTICIPANTS BE RECORDED IN A RESOLUTION OR CHAIRMAN'S STATEMENT AS ABOVE, SO THAT SOME OBJECTIVE EVIDENCE WILL BE AVAILABLE ON RECORD TO INDICATE THAT, DESPITE COMMITMENT LANGUAGE, THERE WAS NO INTENT TO MAKE LEGALLY BINDING AGREEMENTS.  
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7. DELEGATION SHOULD PRESS FOR ABOVE SOLUTION AT EARLIEST POSSIBLE TIME AND KEEP DEPARTMENT ADVISED. DELEGATION ALSO WILL NEED TO REMAIN VIGILANT TO SEE THAT ALL TEXTS, EVEN IF CONSIDERED POLITICAL STATEMENTS, ARE PROVIDED FOR REVIEW IN A TIMELY FASHION BY DEPARTMENT SO THAT DEPARTMENT MAY SEE THAT TEXTS ARE NOT CONTRARY TO U.S. LAW AND DO NOT CONTAIN STRONG AGREEMENT LANGUAGE WHICH WOULD CAST DOUBT OVER CONFERENCE RESOLUTION DISCUSSED ABOVE. IN THE EVENT THIS SOLUTION IS NOT ACCEPTED, DELEGATION SHOULD SEEK FURTHER INSTRUCTIONS.

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